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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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No. 1019

313 US #4
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THE CENTRAL NATIONAL BANK OF CLEVELAND,
TRUSTEE,
Petitioner,

vs.

ROBERT O'BRIEN, EXECUTOR OF THE ESTATE OF JAMES O. MILLS, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO, AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of the matter involved	2
Facts and issues	2
Rulings of the Common Pleas Court which were affirmed by the Court of Appeals	5
Questions presented	6
Articles of the Constitution and Statutes involved	6
Reasons relied on for the allowance of the writ	7
Prayer for writ	9
Brief in support of petition	10
Opinion of the Federal Court	10
Opinions below	10
Jurisdiction of this Court	10
Statement of the case	14
Specification of assigned errors	14
Summary of argument	14
Argument	15
I. The release and discharge of its claim for rent in the Building Company proceeding, did not release the liability of the guarantor	15
II. The decree of the Federal Court specifically contains a provision that the release and discharge of the claim for rent shall not be construed as releasing the liability of the guarantor, and the provision is not a nullity	16
Appendix—Excerpts from cases cited	23
—Articles of Constitution involved	24
—Statutes involved	24

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Page

TABLE OF CASES CITED.

California v. *Deseret Water, etc., Co.*, 243 U. S. 415 11
Chesapeake & Ohio Ry. Co. v. *McCabe*, 213 U. S. 207 11
Continental Illinois National Bank and Trust Co. v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 21
Diversey Building Co., In re, 86 F. (2d) 456 15
Dowell v. *Applegate*, 152 U. S. 327 ..... 8, 11, 19
Dupasseur v. *Rochereau*, 21 Wall. 130 19
Durfee Trust Co. v. *Steiger*, 296 Mass. 136 ..... 7, 15
Embry v. *Palmer*, 107 U. S. 3 19
Forsyth v. *Hammond*, 166 U. S. 506 ..... 8, 19
Harding, Ex parte, 219 U. S. 363 ..... 8, 19
Hancock National Bank v. *Farnham*, 176 U. S. 640 19
Local Loan Co. v. *Hunt*, 292 U. S. 234 21
Louisville, N. A. & C. Ry. Co. v. *Louisville Trust Co.*, 174 U. S. 552 21
Margolies v. *Kleidman*, 266 Fed. 203 16
McCormick v. *Market Bank*, 165 U. S. 538 10
Nine North Church St., In re, 82 F. (2d) 186 ..... 7, 15, 21
Nutt v. *Knut*, 200 U. S. 13 11
Penn Casualty Co. v. *Pennsylvania*, 294 U. S. 189 11
Phoenix Fire and Marine Ins. v. *Tennessee*, 161 U. S. 174 11
Pittsburgh, &c., Ry. v. *Loan & Trust Co.*, 172 U. S. 493 11
Seabury v. *Green*, 294 U. S. 165 10
Stoll v. *Gottlieb*, 305 U. S. 165 ..... 8, 11, 19, 21
Supreme Lodge, Knights of Pythias v. *Meyer*, 265 U. S. 30 19
U. S. ex rel. Adler v. *Hammond*, 104 Fed. 862 16
Union Trust Co. v. *Willsea*, 275 N. Y. 164 ..... 7, 15
West Side Belt R. R. Co. v. *Pittsburgh Construction Co.*, 219 U. S. 92 11

STATUTES CITED.

Constitution of the United States:
Article I, Sec. 8, Subsec. Fourth 19, 24
Article III, Sec. 2 ..... 19, 24

Page
Article IV 24
Judicial Code, Section 237(b), as amended (28 U. S. C A. 344(b)) 10
U. S. C., 1926, Title 11:
Ch. 1, Sec. 1(8) and (12) (p. 24) (Sec. 1(8) and 1(12) Bankruptcy Act) 16, 19, 20, 24
Ch. 2, Sec. 11 (p. 43) (Sec. 2, Bankruptcy Act) 20, 24
U. S. C., 1934, Title 11:
Ch. 3, sec. 34 (p. 143) (Sec. 16, Bankruptcy Act) 15, 20, 25
Ch. 3, Sec. 35 (p. 150) (Sec. 17, Bankruptcy Act) 15, 20, 25
Ch. 8, Sec. 206 (p. 1057) (Sec. 77-B (a) Bankruptcy Act) 20, 25
Ch. 8, Sec. 207(a) (p. 1057) (Sec. 77-B (a) Bankruptcy Act) 20, 25
Ch. 8, Sec. 207(b) (p. 1059) (Sec. 77-B (b) Bankruptcy Act) 20, 26
Ch. 8, Sec. 207(g) (p. 1067) (Sec. 77-B (g) Bankruptcy Act) 20, 26
Ch. 8, Sec. 207(h) (p. 1067) (Sec. 77-B (h) Bankruptcy Act) 20, 27
Ch. 8, Sec. 207 (j) (p. 1068) (Sec. 77-B (j) Bankruptcy Act) 20, 27
Ch. 8, Sec. 207(o) (p. 1070) (Sec. 77-B (o) Bankruptcy Act) 21, 27

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THE CENTRAL NATIONAL BANK OF CLEVELAND, TRUSTEE,

Petitioner,

vs.

ROBERT O'BRIEN, EXECUTOR OF THE ESTATE OF JAMES O. MILLS, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO, AND BRIEF IN SUPPORT THEREOF.

Petition.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, The Central National Bank of Cleveland, Trustee, by its attorney, respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of Franklin County, Ohio (R. 230), being the highest court of said State in which a decision could be had, the decision of said court having been entered on December 6, 1940 (R. 230). By its decision the said Court of Appeals

affirmed the judgment of the Court of Common Pleas of Franklin County, Ohio (R. 230).

The petitioner duly filed in the Supreme Court of Ohio, a motion directing the Court of Appeals to certify its record for the purpose of reviewing the judgment of said Court of Appeals (R. 232), and on February 5, 1941, it was overruled (235); an application for rehearing was duly filed and on February 26, 1941, it was overruled (235).

The Common Pleas Court rendered judgment for the respondent on two grounds (216):

> 1. That the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act released the liability of respondent who had guaranteed payment of said claim.
>
> 2. That the proviso in the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor was a nullity.

Statement of Matter Involved.

Facts and Issues:

Your petitioner brought suit in the Common Pleas Court of Franklin County, Ohio, against James O. Mills, now deceased (Robert O'Brien, Executor of the Estate of James O. Mills was substituted as defendant in the action). The pertinent part of the action was to recover delinquent rent due from James O. Mills who had guaranteed payment of rent when due under a lease made between the Smythe Building Company, herein called the Building Company, as lessor, and The Mills-Cleveland Restaurant Company, herein called the Restaurant Company, as lessee (2), said lease having been assigned and transferred by the Building Company to The Guardian Trust Company, Trustee (pred-

ecessor trustee of your petitioner), as additional security for the payment of $400,000 par value of bonds issued and sold to the public by the Building Company (50). Before this action was brought, the petitioner's rights in respect of said guaranty was determined by the plan of reorganization of the Building Company (96), and the decree of the United States District Court, Northern District of Ohio, Eastern Division, confirming said plan in proceedings for the reorganization of said Company under Section 77-B of the Bankruptcy Act, as amended (144). The respondent set up and claimed as a complete defense to the suit in the Common Pleas Court, the proceedings in the Federal Court to reorganize both companies which showed:

1. That respondent unconditionally guaranteed payment of rent when due under a lease made between the Building Company as lessor, and the Restaurant Company as lessee (p. 48, par. 2).

2. That the liability of the Restaurant Company to the Building Company for rent was discharged in proceedings to reorganize the Restaurant Company under Section 77-B of the Bankruptcy Act (138).

3. That the Building Company was the sole creditor of the Restaurant Company affected by the plan of reorganization of the Restaurant Company (195).

4. That the liability of the Restaurant Company to the Building Company was discharged in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act (145).

5. That in the proceeding to reorganize the Building Company, the question of whether the effect of the confirmation of the plan of reorganization and its *execution* was to release the guarantor was determined by the United States District Court (144).

6. That the guarantor was the president of both companies and the owner of practically all of the stock of both companies (190), and holders of all the stock of the

Building Company, except the holder of two shares, accepted the plan (142).

7. That pursuant to the plan of the Building Company and the decree confirming it, the Building Company and the Trustee *executed* a release and discharge of said claim for rent (136).

8. That the plan of the Building Company was *executed* and consummated in accordance with the terms and orders of the court, and it was approved by the court (145).

9. That the Building Company was discharged from all its debts except as provided by the plan (198).

The respondent claimed that the release and discharge of the claim for rent in the Building Company proceeding released the liability of the guarantor. Your petitioner claimed first, that the proceeding did not release his liability, and second, that the decree of the District Court confirming the plan of the Building Company was not in part a nullity.

In the first trial the Common Pleas Court rendered judgment for respondent on two grounds:

1. That the discharge of the liability of the Restaurant Company in the proceedings for its reorganization released the liability of the guarantor.

2. That in an action brought by the petitioner against the guarantor to collect defaulted rent, the fact that the obligation for which the lease was pledged to the petitioner was not in default, barred the action against the guarantor.

The Court of Appeals reversed the judgment of the Common Pleas Court on the grounds (201):

1. That the discharge of the liability of the Restaurant Company in the proceedings for its reorganization did not release the liability of the guarantor, and

2. That in an action brought by the petitioner against the guarantor to collect defaulted rent, the fact that the obligation for which the lease was pledged to the petitioner was not in default, did not bar the action against the guarantor,

and remanded the cause for a new trial (215).

In the second trial the Common Pleas Court again rendered judgment for respondent (225), and on appeal the Court of Appeals affirmed its judgment (230) on the grounds stated in the opinion of the Common Pleas Court (228), but affirmed the judgment in respect of the liability of respondent as principal obligor (lessor), on another lease on a ground involving a State question and not involving a Federal question (228), and, accordingly, that part of this action in respect of his liability as principal obligor is not made a part of this petition for a writ of certiorari.

Rulings of the Common Pleas Court which were affirmed by the Court of Appeals:

The Common Pleas Court held that the case turned upon the effect of the release of the claim for rent. Was the release in the eyes of the law voluntary or involuntary? (219). The Court decided that the release was voluntary, for reasons necessarily involving two Federal questions (216):

1. Did the release and discharge of the claim for rent in the proceedings to reorganize the Building Company release the liability of the guarantor?

2. Is that portion of the decree in the proceedings to reorganize the Building Company providing that the liability of the guarantor should not be released, but should be reserved for the benefit of bondholders, a nullity?

The Court of Appeals affirmed the judgment of the Common Pleas Court, (230) and thereby deprived petitioner of

a right or immunity claimed under a decree of the United States District Court and the Constitution and Statutes of the United States.

The questions presented are clear cut:

1. Did the release and discharge of the claim for rent in the proceedings to reorganize the Building Company release the liability of the guarantor?

2. Is that portion of the decree of the District Court in said proceedings, which provided that the confirmation and *execution* of the plan should not release the liability of the guarantor a nullity?

Articles of the Constitution and Statutes Involved:

The Articles of the Constitution and the Statutes involved are listed below, and extracts thereof are set out in the Appendix:

Constitution, Article I, Sec. 8, Subsec. Fourth; (24).
Article III, Sec. 2; (24).
Article IV, (24).

U. S. C. 1926, Title 11:

Ch. 1, Sec. 1 (8) and (12) (p. 24) (24).
Ch. 2, Sec. 11 (p. 43) (24).

U. S. C. 1934, Title 11:

Ch. 3, Sec. 34 (p. 143 (25).
Ch. 3, Sec. 35 (p. 150) (25).
Ch. 8, Sec. 206 (p. 1057) (Sec. 77-B (a) Bankruptcy Act) (25).
Sec. 207 (a) (p. 1057 (Sec. 77-B (a) Bankruptcy Act) (25).
Sec. 207 (b) (p. 1059) (Sec. 77-B (b) Bankruptcy Act) (26).
Sec. 207 (g) (p. 1067) (Sec. 77-B (g) Bankruptcy Act) (26).
Sec. 207 (h) (p. 1067) (Sec. 77-B (h) Bankruptcy Act) (27).

Sec. 207 (j) (p. 1068) (Sec. 77-B (j) Bankruptcy Act) (27).
Sec. 207 (o) (p. 1070) (Sec. 77-B (o) Bankruptcy Act) (27).

Reasons Relied On for the Allowance of the Writ.

The reasons relied on for the allowance of the writ are two:

1. The Federal question raised by the decision of the State court that the release and discharge of a claim owing a corporation in a proceeding for its reorganization, altered the liability of the guarantor of the claim, was decided by the State court in a way not in accord with the decision of the Federal court in the Building Company proceeding, and not in accord with the applicable principles decided in other Federal courts; Re *Nine North Church St.*, 82 F. (2d) 186 (2 C. C. A.); and not in accord with the applicable principles declared by the decisions of the highest courts of other States; *Durfee Trust Co.* v. *Steiger*, 296 Mass. 136; *Union Trust Co.* v. *Willsea*, 275 N. Y. 164, and has not heretofore been determined by this Court.

The State court construed the Bankruptcy Act and held that the release and discharge of said claim released the liability of the guarantor. The decision of the State court is absolutely not in accord with the decision of the Federal court in the proceedings to reorganize the Building Company, and is not in accord with the applicable principles of the decisions of other Federal courts and the highest courts of other States cited in the preceding paragraph.

2. The Federal question raised by the decision of the State court that a decree of the District Court in a proceeding to reorganize a corporation that the release and discharge of a claim owing to it should not release and discharge the liability of the guarantor of the claim, was a

nullity, was decided by the State court in a way not in accord with the decision of the Federal court in the Building Company proceeding, and probably not in accord with the controlling principles declared by the decisions of this Court in *Dowell* v. *Applegate,* 152 U. S. 327; *Ex Parte Harding,* 219 U. S. 363, and *Stoll* v. *Gottlieb,* 305 U. S. 165.

The State court failed to give proper effect to a decree of a Federal Court; it held that that part of the decree of the Federal court in the proceeding to reorganize the Building Company providing that the confirmation and *execution* of the plan should not be construed as releasing and discharging the liability of the guarantor, was a nullity.

The State court's decision on the controlling principles involved is probably not in accord with the decisions cited in the second preceding paragraph.

The decision of the State court in this action that the release and discharge of the claim for rent, in proceedings for reorganization of a corporation, releases the liability of the guarantor, is one way and the decision of the District court in the proceedings to reorganize the Building Company, and the applicable principles of the decisions of other Federal courts and the highest courts of other States is the other.

The decision of the State court in this action that a part of the decree of the District court is a nullity is one way, and the controlling principles declared in its decisions by this Court are the other.

All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions on both questions involved herein offer the strongest inducement for this Court to exercise its authority to finally settle both of these questions. *Forsyth* v. *Hammond,* 166 U. S. 506, 515; *Ex Parte Harding,* 219 U. S. 363, 369.

Section 77-B of the Bankruptcy Act as amended, is now Chapter X of the Bankruptcy Act (The Chandler Act), and

is a comparatively new remedial statute, the scope of which has not been fully determined by this Court. A great many reorganization plans, and decrees confirming them, involving large sums of money, property of great value and many persons through the United States, have been and are being involved in actions in the State courts.

If the decision of the courts of Ohio is allowed to stand unreversed, and is followed hereafter, it will lead to great confusion and misapprehension in respect of whether the liability of a guarantor is altered by the release and discharge of a claim in proceedings for reorganization of a corporation, and will lead to a disregard for the decrees of the Federal courts. It opens the door to a successful attack on every plan, order and decree of the Federal courts in proceedings under Section 77-B, the applicable parts of which are now contained in Chapter X of the Bankruptcy Act (Chandler Act), with all the unfortunate consequences that must follow.

WHEREFORE, it is respectfully submitted that the prayer for a writ of certiorari to review the judgment of the Court of Appeals of Franklin County, Ohio, should be granted.

BRIEF.

The Opinion of the Federal Court.

The opinion of the Special Master whose report was confirmed by the United States District Court in the proceeding to reorganize the Building Company appears at page 124 of the Record filed herein.

Opinions Below.

The opinion of the Court of Appeals on the first appeal appears at page 201 of the Record herein, and is reported in 62.0 App. 413.

The opinion of the Common Pleas Court on the second trial appears at page 216, and the opinion of the Court of Appeals on the second appeal at page 227 of the Record herein. The pertinent part appears at page 228.

Jurisdiction of This Court.

This Court has jurisdiction of this cause under Section 237 (b) Judicial Code of the United States, as amended (28 U. S. C. A. Sec. 344 (b)).

The decision of the State court that the liability of the guarantor was altered and he was released in the proceeding, necessarily raised a Federal question and deprived the petitioner of a right or immunity claimed under the Constitution and Statutes of the United States. In this situation this Court has jurisdiction. *McCormick* v. *Market Bank,* 165 U. S. 538; *Seabury* v. *Green,* 294 U. S. 165.

The State court construed the Bankruptcy Act and declared that as a result of the proceedings to recognize the Building Company the guarantor was released from liability and deprived the petitioner of a right or immunity claimed under the Constitution and Statutes of the United States.

The refusal of the State court to give proper effect to the decree of the Federal court necessarily raised a Federal

question, and deprived the petitioner of a right or immunity claimed under the decree of a Federal court. In this situation this Court has jurisdiction. *Dowell* v. *Applegate,* 152 U. S. 327; *Penn Casualty Co.* v. *Pennsylvania,* 294 U. S. 189; *Stoll* v. *Gottlieb,* 305 U. S. 165.

The State court refused to give proper effect to a decree of the Federal court and declared that it was in part null and void, and thereby deprived the petitioner of a right or immunity claimed under a decree of a Federal court.

The refusal of the State court to give full faith, credit and effect to the decree of the Federal court necessarily raised a Federal question (*Phoenix Fire and Marine Insurance* v. *Tennessee,* 161 U. S. 174, 185; *Chesapeake & Ohio Railway Co.* v. *McCabe,* 213 U. S. 207, 215; and *West Side Belt R. R. Co.* v. *Pittsburgh Construction Co.,* 219 U. S. 92, 99); and deprived the petitioner of a right or immunity claimed under the Constitution and the Statutes of the United States. In this situation this Court has jurisdiction (*Nutt* v. *Knut,* 200 U. S. 13, 18-19; *Pittsburgh &c. Railway* v. *Loan & Trust Co.,* 172 U. S. 493, 507-510).

The State court declared a part of the decree a nullity and thereby deprived petitioner of a right or immunity claimed under the Constitution and Statutes of the United States.

The determination of these questions by the State court brings this case within the jurisdiction of this Court. (*California* v. *Deseret Water, etc., Co.,* 243 U. S. 415, 417.)

At the inception of this action the respondent filed an answer in the trial court in which he specifically set up the proceedings in the District Court of the United States for the Northern District of Ohio, Eastern Division, for the reorganization of the Restaurant Company and the Building Company under Section 77-B of the Bankruptcy Act (6). The petitioner filed a reply in which it admitted the reorganization proceedings of both companies (100). At the trial inter alia the decree confirming the plan of the Restau-

rant Company was offered in evidence (134). The report of the Restaurant Company on the consummation of the plan was approved by the court. Inter alia the report stated that the Building Company and your petitioner had executed and delivered to the Restaurant Company a release of its claim for rent (140 par. 6), and the decree confirming the plan of the Building Company (141), including that part of the decree of the Building Company determining that the release and discharge of its claim for rent against the Restaurant Company should not be construed as releasing the guarantor from his liability (144). The plan of reorganization of the Restaurant Company (73) and the Building Company (89) inter alia provided that the Restaurant Company should issue certain new stock to the Building Company in full satisfaction of its claim for rent, and the Building Company plan provided that it should assign and transfer said new stock to the predecessor of the petitioner as collateral security for the payment of the aforesaid bonds issued by the Building Company (96); and the Building Company plan authorized the Trustee to release and discharge its claim for rent on receipt of the securities called for by the plan (96).

Pursuant to the plan and the decree of the Court inter alia, the Building Company and your petitioner acknowledged receipt of securities called for by the plan, including $23,000 of bonds owned by respondent which were pledged with your petitioner as additional security for said bonds, as provided in the plan, and released and discharged the Restaurant Company from liability for rent. The *execution* of the plan was reported to the court, and the court approved the report and expressly found that the Building Company plan had been consummated and *executed* in accordance with the terms thereof and of all orders of the Special Master and the court (145, 146, par. 2).

The question of whether the guarantor should be released from liability by the confirmation and *execution* of the plan of the Building Company was specifically determined by the United States District Court upon the objection of a bondholder (126). Nevertheless, the trial court held that he was released (216). The trial court refused to give proper effect to the decree of the Federal court and refused to give full faith, credit and effect to the plan of reorganization of the Building Company and the decree of the District Court on the question of whether or not the guarantor was released from liability, and overruled petitioner's motion for a new trial and dismissed the action and entered judgment against the petitioner for costs (225).

The petitioner appealed to the Court of Appeals of Franklin County, Ohio, which court affirmed the Common Pleas Court (230) on the grounds stated in the opinion of the trial court (228). The petitioner duly filed a motion in the Supreme Court of Ohio directing said Court of Appeals to certify its record (232) and contended that the release and discharge of the claim in the proceeding to reorganize the Building Company did not release the liability of the guarantor (233), and that the provision in the decree of the Federal court that the confirmation and *execution* of the plan should not be construed as releasing the guarantor, was not a nullity (233).

The Common Pleas Court proceeded to construe the Bankruptcy Act and held that the release and discharge of the claim in the proceedings altered the liability of the guarantor and released him therefrom, and held that the decree determining the rights of the petitioner in respect of his guaranty was a nullity (216).

The Court of Appeals affirmed the judgment of the Common Pleas Court (230) on the grounds stated in the opinion of the Common Pleas Court (228), and the Supreme Court overruled the motion of petitioner to require said Court

of Appeals to certify its record for the purpose of reviewing the judgment of said Court of Appeals (235), and overruled the motion of the petitioner for rehearing (235), and thereby the petitioner was deprived of the right or immunity claimed under the Constitution and Statutes of the United States, and claimed under the decree of the Federal court.

Statement of the Case.

The facts in this case are set out in the first opinion of the Court of Appeals (62 Ohio Appeals 413 (201), the opinion of the Common Pleas Court (216), and the second opinion of the Court of Appeals (227).

Specification of Assigned Errors.

The State court erred in holding that the release and discharge of the claim of the Building Company against the Restaurant Company in the proceedings to reorganize the Building Company, released and discharged the liability of the guarantor of said claim.

The State court erred in holding that the decree of the United States District Court was in part a nullity.

The State court erred in its refusal to give proper effect to the decree of the Federal Court.

The State court erred in its refusal to give full faith, credit and effect to the plan of reorganization of the Building Company and the decree of the Federal court which determined the right of the petitioner, thereby depriving petitioner of a right or immunity claimed under the Constitution and States of the United States.

Summary of Argument.

1. The release and discharge of the claim of the Building Company against the Restaurant Company in the proceeding to reorganize the former company under

Section 77-B of the Bankruptcy Act did not release the guaranty of the respondent.

2. The decree of the Federal Court confirming the plan of reorganization of the Building Company, is not in part a nullity.

ARGUMENT.

I.

The release and discharge of its claim for rent in the Building Company proceeding, did not release the liability of the guarantor.

Section 77-B of the Bankruptcy Act (U. S. C. 1934, Title 11, Ch. 3, Sec. 35, page 150, Bankruptcy Act Sec. 17) provides that a discharge in bankruptcy shall release the bankrupt from all provable debts except those enumerated in the Act, but the Bankruptcy Act (U. S. C. 1934, Title 11, Ch. 3, Sec. 34, page 143, Bankruptcy Act, Sec. 16), provides that the liability of a guarantor shall not be altered by the discharge of the bankrupt.

The question of whether in proceedings to reorganize a corporation, a release and discharge of a claim owing to it alters the liability of the guarantor of said claim has not been decided by this Court, but in the proceeding to reorganize the Building Company, the Federal court held that the release and discharge of the claim did not alter the liability of the guarantor, and according to the applicable principles declared by other Federal courts in *Re Nine North Church St.*, 82 F. (2d) 186 (2 C. C. A.), and in *Re Diversey Building Co.*, 86 F. (2d) 456 (7 C. C. A.), and the applicable principles declared by the highest courts of other states in *Durfee Trust Co.* v. *Steiger*, 296, Mass. 136, and in *Union Trust Co.* v. *Willsea*, 275 N. Y. 164, the release and discharge of said claim did not release the guarantor of his liability.

The State court proceeded to construe the law according to its own conception and held that the release and discharge of the claim altered the liability of the guarantor, and he was released therefrom.

The State court held that because the plan of reorganization of the Building Company provided that the claim for rent owing to it by the Restaurant Company should be released and discharged instead of discharged alone, and because the receipt for the securities called for by the plan contained a provision releasing and discharging the claim of the Building Company against the Restaurant Company instead of a discharge alone, the guarantor was released from liability.

The Bankruptcy Act itself (U. S. C. 1926, Title 11, Ch. 1, Sec. 12) p. 24, defines the meaning of the word "discharge". It defines "discharge" as the "release" from all of its provable debts, except those enumerated in the Act.

This Court has not defined the meaning of the word "discharge", but in *U. S. ex rel Adler* v. *Hammond*, 104 Fed. 862, 864 (6 C. C. A.), and in *Margolies* v. *Kleidman*, 266 Fed. 203, 204 (2 C. C. A.), the Court held that the word "release" and the word "discharge" were synonymous. Whether a "release" and "discharge" are synonymous has not been determined by this Court.

II.

The decree of the Federal Court specifically contains a provision that the release and discharge of the claim for rent shall not be construed as releasing the liability of the guarantor, and the provision is not a nullity.

In the Building Company proceeding the court confirmed the plan of the Building Company on the express condition that the guarantor should not be released, and made an order that such a provision be contained in the decree con-

firming its plan. The court made the order after hearing the objection of a bondholder to the plan on the ground that it might be construed as releasing the liability of the guarantor.

In the proceeding to reorganize the Building Company, the court expressed the opinion that as a matter of law the guarantor would not be released as a result of the proceeding (126), but in order to assure the bondholders that his guaranty would not be lost to them, the court made an order that the decree confirming the plan should contain a provision that the confirmation and *execution* of the plan should not be construed as releasing and discharging the liability of the guarantor (126).

Pursuant to the decree of confirmation the plan was duly *executed,* and *inter alia* the securities called for by the plan were delivered to your petitioner, and the Building Company and your petitioner *executed* a receipt for said securities, which receipt contained a release and discharge of the claim of the Building Company against the Restaurant Company for rent. The *execution* of the plan was reported to the court, and the court entered a final decree finding that the plan had been executed in accordance with its terms, and in accordance with the terms and all orders of the Special Master and of the court, and the court approved it and discharged the Building Company form its liabilities, except as provided in the plan.

The bondholder did not appeal from the decree of the court that the confirmation and *execution* of the plan should not release the guarantor. Of course there was no occasion for him to appeal because the decision was in his favor, and yet the State court held that your petitioner, which is Trustee for the bondholders, cannot maintain this action against the guarantor because the decree of the Federal court, reserving his guaranty, is a nullity and he has been released from liability.

Notwithstanding the provision in the decree of the Federal court confirming the plan that the liability of the guarantor should be preserved for the benefit of holders of bonds issued by the Building Company, whether accepting the plan or not, and that the confirmation and *execution* of the plan and the liquidation of its claim for back rent for stock should not be construed as releasing and discharging the liability of the guarantor, and notwithstanding that in its final decree the Federal court found that the plan had been executed in accordance with the plan and the orders of the court, nevertheless the State court proceeded to construe the effect of the said provision in the decree confirming the plan according to its own conception of law, and held that said provision was a nullity.

The State court refused to give proper effect to the decree of the Federal court. The plan of the Building Company provided that the Building Company should receive new stock of the Restaurant Company in liquidation of its claim for rent, and should transfer it to the predecessor of the petitioner as security for bonds held by the public. The plan was silent in respect of the liability of the guarantor, but the decree confirming it contained a provision that its confirmation and *execution* should not be construed as releasing and discharging the liability of the guarantor. The State court utterly disregarded the plan and the decree confirming it, and entered judgment against the petitioner for costs. The court was competent to determine whether the effect of the confirmation and *execution* of the plan should or should not release the liability of the guarantor, and it decided that question. Whether it properly determined the question was beyond the scope of inquiry of the State court. When the decree of a Federal court confirming a plan of reorganization of a corporation is presented as a complete defense to an action, the examining court may inquire into the effect of the plan and may examine

the decree to determine its effect, but when both questions have previously been determined by the Federal court, the examining court is bound by that decision. (*Ex Parte Harding*, 219 U. S. 363, 369; *Dowell* v. *Applegate*, 152 U. S. 327, 340; *Forsythe* v. *Hammond*, 166 U. S. 506, 518.)

State courts cannot deny the correctness of a ruling of the Federal court in construing the Bankruptcy Act, nor can the State courts deny the correctness of the ruling of the Federal court in construing the effect of the confirmation and *execution* of a plan on the liability of a guarantor, which ruling was made a part of the decree confirming the plan.

The proposition that the decrees of the United States District Courts are entitled to the same full faith, credit and effect in the State courts as the judgments of a sister State under Article IV of the Constitution of the United States, has been conclusively determined by this Court in the following cases:

Supreme Lodge, Knights of Pythias v. *Meyer*, 265 U. S. 30, 33;
Hancock National Bank v. *Farnham*, 176 U. S. 640, 645;
Embry v. *Palmer*, 107 U. S. 3, 9;
Dupasseur v. *Rochereau*, 21 Wall. 130;
Stoll v. *Gottlieb*, 305 U. S. 165.

The power of the Federal court in this case rests upon—

Article I, Section 8, Subsec. Fourth of the Constitution, which gives Congress power to establish laws on the subject of bankruptcy throughout the United States;

Article III, Section 2, of the Constitution, which provides that the judicial power shall extend to all cases in law or in equity arising under the Constitution and laws of the United States;

U. S. C. 1926, Title 11, Ch. 1, Sec. 1 (8), p. 24 (Bankruptcy Act, Sec. 1 (8)), which makes District Courts of the United States courts of bankruptcy;

U. S. C. 1926, Title 11, Ch. 1, Sec. 1 (12), p. 24 (Bankruptcy Act, Sec. 1 (12)), which defines "discharge" as meaning the "release" of the bankrupt.

U. S. C. 1926, Title 11, Ch. 2, Sec. 11, p. 43 (Bankruptcy Act, Sec. 2), which vests the courts of bankruptcy with such power as may be necessary for the enforcement of the Bankruptcy Act;

U. S. C. 1934, Title 11, Ch. 3, Sec. 34, p. 143 (Bankruptcy Act, Sec. 16), which provides that the liability of the guarantor was not altered by the discharge of the bankrupt;

U. S. C. 1934, Title 11, Ch. 3, Sec. 35, p. 150 (Bankruptcy Act, Sec. 17), which provides that a discharge in bankruptcy shall release the bankrupt from all provable debts except those enumerated in the Act;

U. S. C. 1934, Title 11, Ch. 8, Sec. 206, p. 1057 (Sec. 77-B, Bankruptcy Act), which provides that the courts of bankruptcy shall have original jurisdiction in proceedings under Section 77-B of the Bankruptcy Act;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (a), p. 1057 (Sec. 77-B (a)), Bankruptcy Act, which provides that the court shall have and may exercise all powers which a Federal court would have had it appointed a receiver in equity;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (b), p. 1059 (Sec. 77-B (b)), Bankruptcy Act, which shows what provisions may be included in a plan of reorganization;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (g), p. 1067 (Sec. 77-B (g)), Bankruptcy Act, which provides that upon confirmation the provisions of the plan shall be binding upon the debtor, stockholders and the creditors;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (h), p. 1067 (Sec. 77-B (h)), Bankruptcy Act, which provides that upon confirmation of the plan the debtor shall have full power to execute it, subject to the supervision of the judge;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (j), p. 1068 (Sec. 77-B (j)), Bankruptcy Act, which provides that a certified

copy of the decree confirming the plan shall be evidence of the jurisdiction of the court and the regularity of its proceedings; and

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (o), p. 1070 (Sec. 77-B (o)), Bankruptcy Act, which provides that the jurisdiction and powers of the court shall be the same as in voluntary bankruptcy proceedings.

This Court has held that bankruptcy proceedings are equity proceedings (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240); that proceedings under Section 77 of the Bankruptcy Act are proceedings in equity (*Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 676); and that a guaranty may be cancelled in equity (*Louisville, N. A. & C. Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 567); *Stoll* v. *Gottlieb*, 305 U. S. 165.

There is no fixed form that a plan of reorganization must take. The court of original jurisdiction must consider and weigh all the rights and equities involved, and if it finds the plan is fair, equitable and feasible, is proposed in good faith and is in compliance with the provisions of subdivision (b) of Section 77-B of the Bankruptcy Act, it may, in the exercise of its equitable discretion, confirm it and make it binding upon all parties involved. But relief of the guarantor is not essential to the reorganization of a corporation under said Act. *In re Nine North Church St.*, 82 F. (2d) 186.

Conclusion.

(1) The State court decided that the release and discharge of the claim of the Building Company against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act released the liability of the guarantor. It decided an important question of Federal law not heretofore decided

by this Court, but in a way not in accord with the decision of the Federal court in said proceeding, and probably not in accord with the applicable principles declared by other Federal courts and the highest courts of other States.

(2) The State court decided that the proviso in the decree that the confirmation and *execution* of the plan of the Building Company should be construed as not releasing the liability of the guarantor was a nullity. It decided another important Federal question in a way probably not in accord with the applicable decisions of this Court. It opened the door to successful attack on every plan, order and decree of the Federal courts in proceedings under Section 77-B of the Bankruptcy Act, the pertinent sections of which are now contained in the Chandler Act. If the proceedings of the Federal courts may be successfully attacked in the State courts, there will be no end to litigation and the result will be extreme uncertainty and confusion as to rights and privileges under the Constitution and statutes of the United States and under decrees of Federal courts.

Your petitioner respectfully submits that the judgment of the Court of Appeals of Franklin County, Ohio, and the judgment of the Common Pleas Court of Franklin County, Ohio, should be reversed and the cause remanded for further proceedings according to law.

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ORLIN F. GOUDY,
Counsel.

APPENDIX.

Excerpts from Cases Cited.

In Margolies *v.* Kleidman, 266 Fed. 203 (2 C. C. A.), at page 204, the court said:

"Indeed the act itself defines 'discharge' to mean a 'release' from provable debts other than those excepted by the statutes."

In Durfee Trust Co. *v.* Steiger, 296 Mass. 136, the indorser of a note contended that the discharge of the corporate maker in reorganization proceedings under Section 77-B of the Bankruptcy Act, was effected not by operation of law but by the voluntary act of the plaintiff in the action. The court held:

"Trust company's acceptance of a plan for reorganization of corporate maker of a note, payable to such company's order, under Bankruptcy Act, with reservation of right to recourse against indorser, in consideration of certain percentage of its claim, held not to discharge indorser."

In Stoll *v.* Gottlieb, 305 U. S. 165, the court held:

"In a proceeding to reorganize a corporation under Section 77-B of the Bankruptcy Act, where the plan of reorganization contains an express provision cancelling the liability of the guarantor, of the debts of the debtor, and after a trial is had in the District Court on the objection of a creditor to the cancellation of the liability of the guarantor the court confirms the plan and a new appeal is taken, the decree is binding."

In Ex Parte Harding, 219 U. S. 363, 369, the court held:

"The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded (see Dowell *v.* Applegate, 152 U. S. 327, 337 and cases cited) and has been so

recently applied (Hine *v.* Morse, 218 U. S. 493), that it may be taken as elementary and requiring no further reference to authority."

Articles of Constitution Involved.

Article I, Section 8, Subsec. Fourth of the Constitution vests Congress with the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

Article III, Section 2, of the Constitution provides:

"(First) The judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, * * *."

Article IV, of the Constitution provides:

"Section 1. Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State. And the Congress may, by general laws prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof."

Statutes Involved.

U. S. C. 1926, Title 11. Ch. 1, Sec. 1 (8), p. 24 (Bankruptcy Act, Sec. 1 (8)):

"* * * 'courts of bankruptcy' shall include the district courts of the United States. * * *"

U. S. C. 1926, Title 11, Ch. 1, Sec. 1 (12), p. 24 (Bankruptcy Act, Sec. 1 (12)):

"* * * (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;"

U. S. C. 1926, Title 11, Ch. 2, Sec. 11, p. 43 (Bankruptcy Act, Sec. 2):

"The courts of bankruptcy as defined in the previous chapter, namely the district courts of the United States in the several States, * * * are hereby made courts of

bankruptcy, and are hereby invested, within their respective territorial limits as established on July 1, 1898, or as they may be thereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceeding * * *, to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; * * *"

U. S. C. 1934, Title 11, Ch. 3, Sec. 34, p. 143 (Bankruptcy Act, Sec. 16):

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

U. S. C. 1934, Title 11, Ch. 3, Sec. 35, p. 150 (Bankruptcy Act, Sec. 17):

"A discharge in bankruptcy which releases the bankrupt from all provable debts except those enumerated in the Act."

U. S. C., 1934, Title 11, Ch. 8, Sec. 206, p. 1057 (Sec. 77-A, Bankruptcy Act):

"In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, Courts of Bankruptcy shall exercise original jurisdiction in proceedings for relief of debtors as provided in Section 77-B of this Act."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (a) p. 1057, (Sec. 77-B (a), Bankruptcy Act):

"Any corporation which could become a bankrupt under Section 22 of this title, * * * may file a petition, * * * stating the requisite jurisdictional facts under this section; * * *. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed

in good faith, or dismissing it. If the petition or answer is so approved, * * * the court in which such order approving the petition or answer is entered * * * shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. * * *"

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (b), p. 1059 (Sec. 77-B (b), Bankruptcy Act):

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise: (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; * * * (9) shall provide adequate means for the execution of the plan, which may include * * * the * * * modification of liens, indentures, or other similar instruments, the curing or waiving of defaults, * * * and the issuance of securities of either the debtor or any such corporation or corporations, * * * in exchange for existing securities, or in satisfaction of claims or rights, * * *. (10) may deal with all or any part of the property of the debtor and may include any other appropriate provisions not inconsistent with this section * * *. The term "claims" includes debts, securties, other than stock, liens or other interest of whatever character."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (g), p. 1067 (Sec. 77-B (g), Bankruptcy Act):

"Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been

filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (h), p. 1067 (Sec. 77-B (h), Bankruptcy Act):

"Upon final confirmation of the plan the debtor * * * shall have full power and authority to and shall put into effect and carry out the plan and order of the judge relative thereto under and subject to the supervision and control of the judge * * *."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (j), p. 1068 (Sec. 77-B (j), Bankruptcy Act):

"A certified copy of the final decree or of an order confirming a plan of reorganization, or of any other decree or order entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the decree or order was made."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (o), p. 1070 (Sec. 77-B (o), Bankruptcy Act):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 1019

THE CENTRAL NATIONAL BANK OF CLEVELAND, TRUSTEE,

Petitioner,

vs.

ROBERT O'BRIEN, EXECUTOR OF THE ESTATE OF JAMES O. MILLS, DECEASED.

BRIEF FOR ROBERT O'BRIEN, AS EXECUTOR OF THE WILL OF JAMES O. MILLS, DECEASED, CONTRA PETITION FOR WRIT OF CERTIORARI.

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CASE CITED

Page

Banana Sales Corporation v. *Chuchanis*, 119 O. S. 75. . 5

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The statement of the grounds on which the Common Pleas Court decided this case (Petitioner's Brief, p. 2) is neither complete nor correct. The issues in the case were in the main, if not entirely, of fact and the judgment in favor of the Executor resulted largely from the recognition by the State courts of the release given by The Smythe Building Company and The Central National Bank of Cleveland, as Trustee, petitioner herein, (R. p. 136), the validity of which release was challenged.

For a statement of the case for the Executor, see the third defense of the amended answer of the Executor beginning at Record, p. 61. See, also, statement of counsel made at the opening of the trial. (R. p. 105).

The case was first submitted to the Common Pleas Court, Judge Duncan presiding, and at the conclusion of the evidence offered by the plaintiff, the Court sustained the motion of the defendant, O'Brien, as Executor, for a judgment in his favor on the ground that it was not shown that there was any default on the part of The Smythe Building Company in the payment of its bonds and, therefore, there was no present right to resort to collateral. That was a sound position. In fact there is no such default. The record at that trial was largely made up of the statements by counsel of what were considered to be admitted facts.

An appeal was taken by the Trust Company to the Court of Appeals, where the judgment was reversed, principally because of the unsatisfactory record. That Court observed that it had searched the record but did not find evidence of the release above mentioned and in the opinion said: (R. p. 213).

> "It might be conceded that if all parties and interests including the holders of the bonds had voluntarily entered into an agreement to cancel the claim, that such an agreement would release the guarantor."

At the second trial in the Common Pleas Court, Judge Leach presiding, more evidence was introduced, including the release. (R. p. 136). Two questions of fact with respect to this release were presented, viz., first, whether there was any consideration for it, the Trust Company contending there was not, and, second, whether it was a voluntary release. Both these questions were decided

in favor of the Executor. Judgment was rendered for the Executor.

On appeal, that judgment was affirmed by the Court of Appeals. (R. p. 227).

The Supreme Court of Ohio denied an application to certify the record to that court and denied a rehearing thereon.

Before executing the release, the Trustee of the trust indenture submitted to the bondholders the advisability of approving the Plan of Reorganization and, for additional and valuable consideration, releasing The Mills-Cleveland Restaurant Company from all obligations to the Trustee and the lessor, The Smythe Building Company. Ninety per cent of the bondholders approved and none objected. (R. p. 142).

As aforesaid, it was contended by the Trust Company, or rather by Dorr E. Warner, the real party in interest herein, (R. p. 144), that there was no consideration for the release,—clearly a question of fact. Let us see what that consideration was.

Prior to the reorganization proceedings, the Trustee held no stock of The Mills-Cleveland Restaurant Company. In the settlement it demanded and received all of the stock of the reorganized Company, excepting one thousand shares of the common stock which were sold to Fred Simonsen, of Detroit, for $50,000, in cash, thus establishing a value for the common stock of $50 per share. The Trustee received, accordingly, sixteen hundred and twenty-five shares of the new preferred stock of the Restaurant Company, (the entire issue), having a par value of $100 per share, and five hundred shares of the new common stock of the Company, without par value, but of the actual value, as aforesaid, of $50 per share. In addition, all dividends on this stock were to be paid to the Trustee by the reorganized Restaurant

Company and put into the sinking fund for the retirement of The Smythe Building Company bonds.

If the value of the preferred stock is to be measured by that of the common, it is worth par.

Next, the Trustee was not willing to accede to the Plan of Reorganization or to execute the said release unless James O. Mills would agree to deposit with the Trustee bonds of The Smythe Building Company of the face value of $23,000 and consent that these bonds be subordinated to all other bonds with respect to the payment of interest and principal. This was done.

This voluntary contribution by James O. Mills must have been and was for the purpose of securing a complete release on the part of the Trustee of the claim for back rent due from The Mills-Cleveland Restaurant Company, on which he was guarantor, and all parties understood that, when this claim was released, Mills, likewise, was relieved of his guaranty. That is what he wished to accomplish for himself and that is what the Trustee and the bondholders intended he should have.

In addition to the above consideration, The Smythe Building Company got a new and extended lease from The Mills-Cleveland Restaurant Company, which would enable The Smythe Building Company to pay the interest and meet the sinking fund provisions for its bonds. The Mills-Cleveland Restaurant Company was its best tenant.

Furthermore, the tenant, The Mills-Cleveland Restaurant Company, paid all of its outstanding indebtedness in full in cash and had new capital furnished, in part, by the sale of its common stock in the amount of $50,000 and became a company in good operating condition.

All of this was in the end for the benefit of the bondholders, since the new lease from the Restaurant Com-

pany was deposited with the Trustee as additional collateral for the payment of the bonds.

As a further consideration for the release, Mills became a guarantor for the payment of the rent on the new Restaurant Company lease, something he did not have to do.

Furthermore, the Trustee demanded and received an order from The Smythe Building Company requiring the reorganized Restaurant Company to pay rent under the new lease directly to The Central National Bank of Cleveland, as Trustee. (R. p. 140, par. 5). Furthermore, a supplemental mortgage was executed in favor of the Trustee, as required by the Plan. (R. p. 146).

The United States Court evidently thoroughly understood this arrangement because in the final Report of the Debtor (R. p. 139) it was shown that: (R. p. 140)

> "On July 20th The Smythe Building Company and Central National Bank of Cleveland as Trustee, executed and delivered to the debtor" (The Mills-Cleveland Restaurant Company) "a release of all indebtedness owing by the debtor under the cancelled lease of March 1, 1932."

This Report was approved and confirmed by the Court. (R. p. 143). From this judgment, no appeal was taken.

We, therefore, conclude that the release by the plaintiff in this case was for an abundant and valuable consideration and brings the case under the rule of *Banana Sales Corporation* v. *Chuchanis*, 119 O. S. 75, the first syllabus of which is as follows:

> "If creditor accepts goods in full payment of a debt owing him by his debtor and executes a written release of the debt to the debtor, one who guarantees the payment of the debt is also released from his obligation as guarantor of the debt."

In the State courts Mr. Warner, with some show of sincerity, contended that the release executed by the Trust Company amounted merely to a receipt for the stock it received. That issue of fact was likewise decided in favor of the Executor.

It may not be successfully contended that there was any failure to recognize the decrees confirming the Plans of Reorganization of either the Restaurant Company or the Building Company. The State courts held that by both the Plans, which were fully carried out, and the voluntary release, the Restaurant Company (and, of course, Mills, the guarantor of rent), were fully released from the claim for rental on the 1932 lease. We have already pointed out the abundant consideration for the Plans of Reorganization and the voluntary release.

Opposite counsel would have this Court believe (Petitioner's Brief, p. 3) that the Executor relied only on the release set forth in the Plan of Reorganization. This is not a fair statement, as will appear from the third defense. (R. p. 61). The effect of the judgment of the State courts is to support entirely the third defense, (R. p. 61), wherein it conclusively appears that the Executor relied upon both the discharge contained in the Plan of Reorganization and the voluntary release. This overthrows the contention of opposite counsel (Petitioner's Brief, p. 8) that the State Court failed to give proper effect to the decree of the Federal Court.

The State courts gave full effect to the decrees confirming the Plans of Reorganization and, likewise, to the direction that a suit be filed to test the liability of Mills. Said courts entertained that suit and tried it and decided in favor of O'Brien, Executor.

Coming now to Paragraph 6 of the decree confirming the Master's Report in the reorganization of The Smythe

Building Company, we observe that it must have been inserted at the instance of Dorr E. Warner, attorney for one bondholder. (R. p. 145). (R. p. 193).

The Special Master reported (R. p. 126) that there was grave doubt as to whether the debtor "could collect the amount involved" from Mills. However, in the decree (R. p. 144) confirming the Master's Report and his findings of fact, it was provided that the liability of Mills, *if any*, might be tested by a suit against him by the Trustee. The Court already knew (R. p. 140) of the release executed to the Restaurant Company by the lessor, The Smythe Building Company, and The Central National Bank of Cleveland, as Trustee, and that the Plan contemplated the complete release of the Restaurant Company from the claim for rental upon the performance of the conditions therein set forth. There is no claim that these conditions were not fully met. *The Federal Court did not adjudge that there was any liability against Mills*, as it might have done, but, on the contrary, as shown by the Plans and decrees, must have concluded there was no such liability, since the principal debtor had been released.

Nevertheless, as may be inferred from the Record (R. pp. 144–5, and R. p.193) at the importunity of Mr. Warner, the Court permitted the filing of this suit against Mills, and, without authority, we insist, proceeded to attempt to make a contract for the Trustee, providing that Mr. Warner should have one-third of any amount recovered against Mills in this suit. The Trustee was certainly able to make its own contract with its counsel.

We rely on the analysis given by Judge Leach on this provision of the decree, as found in the Record, pp. 223–225.

How can it be said that the State Court did not give credit to any part of the judgment of the Federal

Court? It did not refuse to entertain this case *and the Federal Court directed nothing more than that the case should be filed and the question tried.* The case was filed and tried upon the facts, and the State courts found for the Executor. This was certainly giving full faith and credit by the State courts to the decrees of the United States Court.

The real complaint of Mr. Warner is that the State courts erred in their judgments upon the issues of fact. This Court will certainly not care to review questions of that kind. No Federal question appears.

The petition for certiorari should be denied.

Respectfully submitted,

FRED C. RECTOR,
RICHARD T. RECTOR,
Attorneys for O'Brien, as Executor.

50 East Broad Street,
Columbus, Ohio.

(3)

FILED
MAY 26 1941
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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1019.

THE CENTRAL NATIONAL BANK OF CLEVELAND,
Trustee,
Petitioner,

vs.

ROBERT O'BRIEN,
Executor of the Estate of James O. Mills,
Deceased.

REPLY BRIEF OF PETITIONER.

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INDEX.

Authorities Cited.

Case.

Burbank v. Ernst, 232 U. S. 162..... 2

Statute.

Bankruptcy Act, Section 77-B.....1, 4

Rule.

U. S. Supreme Court Rule 27, par. 3..... 3

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REPLY BRIEF OF PETITIONER.

There are two Federal questions of law involved in this action:

1. Did the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act release the liability of respondent who had guaranteed payment of said claim?
2. Was the proviso in the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor a nullity?

In his Opinion (R. 216), Judge Leach held that the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act, did release the liability of respondent who had guaranteed payment of the claim and

The proviso of the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor was a nullity.

The reviewable character of a decision of the highest State Court and what was drawn in question and decided is ascertained from its judgment and opinion. *Burbank vs. Ernst*, 232 U. S. 162.

Judge Leach decided the issue in this case solely on those two Federal questions and no other (R. 216), and his decision was affirmed by the Court of Appeals. (R. 228.) No question of fact was involved in his decision.

The Respondent has attempted to inject into this case questions of fact that are not in the Record in order that this Court will not hear this case on the merits of the Federal questions of law involved. The statements of fact hereinafter quoted from his brief are not in the Record. In making these statements Respondent has violated the rule of this Court which requires that whenever reference is made to the Record it must be accompanied by the Record page number. (Rule 27, par. 3.) There follows, in quotations, statements of fact that are not in the Record.

It is true that prior to the reorganization proceedings the Trustee (your petitioner) held no stock in The Mills-Cleveland Restaurant Company, and received the stock of the reorganized company as provided by the Plan of Reorganization, but the Record contains no evidence that it received said stock as the result of any demand made by the Trustee, but in his brief (page 3), respondent states that the stock was received "in the settlement it demanded." The fact is there is no evidence in the Record that the Trustee ever demanded any settlement of any kind or description.

The Record contains no evidence that—

> "Next, *the Trustee was not willing to accede to the Plan of Reorganization or to execute the said release unless* James O. Mills would agree to deposit with the

Trustee bonds of The Smythe Building Company of the face value of $23,000 and consent that these bonds be subordinated to all other bonds with respect to the payment of interest and principal. This was done." (Respondent's Brief, page 4.) (Italics ours.)

The Record contains no evidence that—

"This voluntary contribution by James O. Mills must have been and was for the purpose of securing a *complete release* on the part of the Trustee of the claim for back rent due from The Mills-Cleveland Restaurant Company, on which he was guarantor, *and all parties understood that, when this claim was released, Mills, likewise, was relieved of his guaranty.* That is what he wished to accomplish for himself and that is what the Trustee and the bondholders intended he should have." (Respondent's Brief, page 4.) (Italics ours.)

The Record shows that the Trustee received an order from The Smythe Building Company requiring the reorganized Restaurant Company to pay rent under the new lease directly to Central National Bank of Cleveland, Trustee (R. p. 140) but the Record contains no evidence "that the Trustee demanded" said order, and the Record contains no evidence that the Trustee made any other demands of any kind or description.

We respectfully submit that because of his failure to comply with Rule 27, par. 3 of this Court requiring him to state the page of the Record where these references are found, such statements should be disregarded. Possibly a motion to strike the brief from the file because of failure to comply with said rule of this Court would be in order.

It is true that there was a valuable consideration for the acceptance of the terms of the Plan of Reorganization of the Building Company by security holders, and for their consent to the discharge of its liabilities, except as provided by the Plan.

Pursuant to the Court order, the Trustee receipted for the exact security called for by the Plan and executed the exact release called for by the Plan. The release contains

nothing not called for by the Plan. The Plan required the Building Company to accept from the Restaurant Company 1625 shares of its new preferred stock and 500 shares of its new common stock in satisfaction of the rent, and the Building Company in turn was to transfer such stock to your petitioner, which, together with $23,000 par value of bonds, it was to hold as security for the payment of bonds held by the public. (R. 136.)

The Trustee executed its part of the Plan strictly in accordance with the decree and order of the Court—it did exactly what the Court ordered it to do. In its final decree the Court found:

> "That the Debtor has fully consummated and executed its Plan of Reorganization in accordance with the terms thereof and of all orders of Carl D. Friebolin, Special Master, and of this Court." (R. 146.)

We respectfully submit that the sole questions presented for the consideration of this Court are as follows:

1. Did the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act release the liability of respondent who had guaranteed payment of said claim?
2. Was the proviso in the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor a nullity?

Respectfully submitted,

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